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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted] 94

GEORGE SCHMIDT,

Petitioner,

vs.

ESQUIRE, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit.

JAY E. DARLINGTON
306 Hammond Building
Hammond, Indiana
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

INDEX.

	PAGE
Opinion below	1
Three related petitions in this court	2
Jurisdiction	2
Questions presented for review	3
Statutes and rules involved	4
Concise statement of the case	4
Complaint	4
Summons	4
Motion to dismiss	5
Motion to Remand	5
The Court of Appeals' opinion	6
Argument	7

CASES CITED.

Consolidated Cosmetics v. D-A. Pub. Co. (7 Cir. 1951), 186 F. 2d 906, 908	9
Industrial Research Corp. v. General Motors Corpn. (D.C. Ohio 1928), 29 F. 2d 623, 627	9
International Shoe Co. v. State of Washington, 326 U.S. 310, at p. 313	8
Runkle v. Burnham (1894), 153 U.S. 216, 225 14 S. Ct. 837, 842	9
31 C. J. S., Evidence, at pages 849-850	9
Sec. 25-316 Burn's Ind. Sts.	7
20 C.J.S., Corporations, Sec. 1948, page 221	8
20 C. J. S., Corporations, Sec. 1949, page 222.	8

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OPINION BELOW.

The Court of Appeals decided this and two companion cases in one combined opinion entitled:

Schmidt v. *Esquire, Inc.*
Schmidt v. *Reader's Digest Association, Inc.*
Schmidt v. *Crowell-Collier Publishing Company,*
210 F. 2d 908
R. 67.

The opinion of the District Court (N. D. Ind.), unreported, so far as we know, is at R. 38.

Three Related Petitions in this Court.

Since this petition is being filed shortly before the effective date of the new Rules, it is impossible to combine these cases in one petition as contemplated by new Rule 23, par. 5.

But a similar result is accomplished by docketing the petitions in the same order the cases are discussed in the Court of Appeals' opinion: (1) the *Crowell-Collier* case, (2) the *Readers Digest* case, (3) the *Esquire* case.

The District Court denied plaintiff's motion to remand this case, substantially the same as in the *Crowell-Collier* case, and then granted this defendant's motion to dismiss for lack of process which was similar to the process in the *Reader's Digest* case.

Both in the District Court's opinion (R. 38) and in the Court of Appeals' opinion (R. 75), the remand question in this case was treated as identical with and decided upon the part of the Crowell-Collier opinion covering that subject. Similarly, the process question in this case, though not identical with the one in the *Reader's Digest* case, was treated as similar in the opinions, and the decision of that question was predicated largely upon the Reader's Digest opinions both in the District Court (R. 38) and Court of Appeals. (R. 78).

Copies of all petitions are being served on respondents in all three cases. (Respondents have the same counsel in the *Crowell-Collier* and *Reader's Digest* cases).

JURISDICTION.

Judgment of affirmance was entered in the Court of Appeals on February 24, 1954 (R. 79) and this petition is filed ninety days thereafter on May 25, 1954. There was no petition for rehearing.

Being a civil case, jurisdiction here is based on 28 U.S.C.A. 1254 and 2101.

QUESTIONS PRESENTED FOR REVIEW.

Accordingly, the question in this case on the motion to remand is the same as in the *Crowell-Collier* case, namely:

(1)

In denying plaintiff's motion to remand, the Court holds that the citizenship of *Tucker Corporation,* for whose benefit this derivative stockholder's action is brought, "is *immaterial* for the purpose of testing *diversity*" jurisdiction of this case which was *removed* from an Indiana state court, contrary to the settled doctrine that the corporation is always an indispensable party in a derivative action.

To reach this conclusion, the opinion goes into the *merits* of the complaint in fact and law, and concludes that the corporation does not have *title* to, and *right to sue* on, this cause of action. This, if true, would be a good defense in the state court after remand. But the further question is whether a District Court can turn a hearing on a plaintiff's motion to remand into a contest on the merits of his complaint.

On the process question, the question is similar to that in the *Reader's Digest* case, namely:

(1) Defendant having been sued in the Indiana state court and served with summons on the secretary of state as its statutory agent, moved for and obtained dismissal on the ground that it was not amenable to the process. Plaintiff's appeal from that judgment raises:

(a) The sufficiency of the factual showing made by defendant to support this motion.

(b) The Court of Appeals' failure to construe and apply the Indiana process statute in deciding this motion, while testing it solely by an inapplicable case, *Cannon* v. *Time* (4 Cir. 1940) 115 F. 2d 423.

(c) The application of the recent Supreme Court precedents to these facts, so far as not controlled by the statute.

STATUTES AND RULES INVOLVED.

On the remand question, the same statutes and rules are involved as in the Crowell-Collier petition, and petitioner asks leave to incorporate by reference that section of that petition.

On the question of process, the same statutes are involved as in the Reader's Digest petition, and petitioner asks leave to incorporate that section of that petition.

CONCISE STATEMENT OF THE CASE.

Complaint.

The complaint, filed the same day, is identical with the Crowell-Collier complaint except that it is based upon a different but similar article on the same subject, published in October instead of June, 1949. (R. 7)

Summons.

Summons were issued and served on the same day and similar manner as the Reader's Digest summons. (R. 27-28).

Motion to Dismiss.

Esquire's motion to dismiss was substantially similar to that of Reader's Digest, for alleged lack of lawful process (served through the Secretary of State). (R. 19).

Supporting the motion, defendant filed the affidavit of its Vice President and Director of Circulation, Blinder stating that it was not subject to service of process in Indiana when served, not licensed to do and has not done any business or engaged in any transaction in Indiana, has no address or bank account and maintains no stock in this state, and has never been in the state in any sense. It prints magazines in Illinois and mails them to subscribers in Indiana, and its magazines are placed in Indiana newsstands by an independent contractor. (R. 21-22.)

Supplemental affidavit of Blinder adds that defendant does not have in Indiana "any employees or agents to gather for it any material to be printed in the magazines it publishes" nor "any employees or agents to solicit advertising for its publications". (R. 31-32).

Motion to Remand.

Defendant had removed this case at the same time, on a petition substantially like Crowell-Collier's. (R. 3)

Plaintiff's motion to remand was filed at the same time and was practically identical in substance with the one in the Crowell-Collier case. (R. 34)

District Court's Opinion.

Filed the same day, the opinion adopts the Crowell-Collier opinion on the subject of remand, and denies the motion. (R. 38).

On the subject of process, the opinion adopts the Reader's Digest opinion and sustains defendants motion to dismiss the defendant for lack of lawful process. (R. 39).

The Court of Appeals' Opinion.

The opinion affirms on the remand question for the same reasons as stated regarding Crowell-Collier. (R. 75).

It affirms on the process question, impliedly adopting its legal discussion regarding Reader's Digest, and adding a brief resume of defendants affidavits. (R. 78).

ARGUMENT.

The remand question being identical and based on a common opinion below, petitioner asks leave to adopt by reference, all of Part I of its Argument in the *Crowell-Collier* case, pages 20-34.

The process question being similar as to law questions, though not the same as to facts, petitioner asks leave to adopt here the law points and authorities in Part II, at pages 21-24 of its Argument in the *Reader's Digest* case.

The Facts on Process.

While plaintiff filed no counter-affidavit as in the *Reader's Digest* case, because he had no information on defendant's operations beyond its affidavits, he contended below and does here that these affidavits, though slightly more informative than that of Reader's Digest, still fail to make sufficient *prima facie* proof to support the motion.

The Court of Appeals' opinion errs if it means to attribute to us a concession that this defendant is not present in Indiana for process. (R. 78). True, the statements in its affidavits do not show it *is* present, but, that is not test. Defendant has the burden of making adequate proof that it is *not* present.

Since *prima facie* jurisdiction of defendant's person appears from the allegations of the complaint laying the basis for serving defendant through the Secretary of State under Sec. 25-316 Burn's Ind. Sts. (R. 7, par. 1), and the sum-

mons and return are admittedly regular on their face (R. 4, 27-28), this creates a *prima facie* though rebuttable presumption of valid service (20 C. J. S., Corporations, Sec. 1948, page 221) and places the burden on defendant to challenge the jurisdiction of its person, if it wishes, by proper pleading and *sufficient proof,* otherwise the objection is waived and the jurisdiction stands. (20 C. J. S., Corporations, Sec. 1949, page 222.)

Esquire's affidavit (R. 21) and supplement thereof (R. 31) are more adequate than the affidavit in the *Reader's Digest* case, but it, too, is composed largely of conclusions that Esquire is "not subject to service of process in the state" and "not doing business" in the state (R. 21) plus the facts that it has "no office" and "no bank account" in the state (R. 21) which are immaterial. (*International Shoe Co.* v. *State of Washington,* 326 U. S. 310, at p. 313.)

But the affidavit does include one short conclusory statement that defendant "never had any *agents* in the State of Indiana who solicit or solicited * * * *subscriptions*" (R. 22),—a statement which was totally lacking in the Reader's Digest affidavit and which Reader's Digest could not put in its affidavit without being guilty of perjury (No. 10907, R. 46, 48). If it were necessary to test the sufficiency of this statement in Esquire's affidavit, we believe it would be insufficient because:

What constitutes an "agent" is a matter of law and Esquire might well be handling the subscriber-obtaining part of its business in Indiana by means which it does not consider agency. The affidavit states that its magazines "are obtainable in the State of Indiana *either* through *subscriptions* or at newsstands" (R. 22) but it is silent as to the manner by which it obtains the subscriptions in the state except the above denial that it does it by "agents." Also the affidavit totally fails to deny that it has agents or

employees in Indiana *generally.* Its denial is confined to lack of subscription-soliciting agents (R. 22) and material-gathering and advertising-soliciting agents. (R. 31-32.)

If necessary to be decided, the above deficiencies would appear to amount to a *failure of proof* of an essential element of defendant's motion, in view of the fact that the magazine publishing business has a number of "essential factors," including the obtaining of subscribers (*Consolidated Cosmetics* v. *D-A. Pub. Co.* (7 Cir. 1951), 186 F. 2d 906, 908), plus the doctrine that silence of a party upon a fact peculiarly within his knowledge raises a presumption that the fact is against him, particularly when he has the burden of proof on the point. This doctrine, which serves an important function in the law of evidence generally by enabling courts to resolve questions where facts are not clear because of the silence or evasiveness of the party possessing them (31 C. J. S., Evidence, at pages 849-850; *Runkle* v. *Burnham* (1894), 153 U.S. 216, 225, 14 S. Ct. 837, 842), applies to proof of a motion attacking the court's jurisdiction of defendant's person by affidavits:

> *Industrial Research Corp.* v. *General Motors Corpn.* (D. C. Ohio 1928), 29 F. 2d 623, 627, point 10.

In the present *Esquire* case, plaintiff was not able to get hold of contradictory facts or documents on this subject and introduce them in a counter-affidavit as he does in the *Reader's Digest* case, but neither was there any counter-affidavit or counter-proof by the plaintiff in the last cited case. There the defendant supported its motion with three affidavits similar to and at least as adequate as defendant's affidavits in this case (p. 625) but the Court held them insufficient to sustain the burden of proof, and as a consequence this "*allows an acceptance of the allegations*

of the bill in this respect as a *true statement''* of the facts supporting jurisdiction of defendant's person. (29 F. 2d 623, at p. 626.)

Wherefore, petitioner prays that this Honorable Court may grant its writ of certiorari to bring up and review this case, and for all other just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LE ROY RUSSELL KREIN,
1 North La Salle Street,
Chicago 2, Illinois,
Attorney for Esquire, Inc.,
Respondent.

THE GUTHRIDGE-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes and Rules Involved	2
Statement of the Case	2
Argument	6
I. The Tucker Corporation Was Properly Disregarded for Diversity Jurisdiction Purposes	7
II. The Action Was Properly Dismissed for Lack of Jurisdiction Over Respondent	17
Conclusion	20

CITATIONS.

Cases.

Cannon v. Time, Inc. (C. C. A. 4, 1940), 115 F. 2d 423 19

Consolidated Cosmetics v. D-A Pub. Co., Inc. (C. C. A. 7, 1951), 186 F. 2d 906, 908 17

Davenport v. Dows, 85 U. S. (18 Wall.) 626 .....8, 12

DeVan, et al. v. United States, et al. (D. Ct. N. J., 1943), 50 F. Supp. 992 10

Fazakerly v. E. Kahn's Sons Co., et al. (C. C. A. 5, 1935), 75 F. 2d 110 .....14, 15

Fulton v. Twentieth Century-Fox Film Corp., et al., 111 F. Supp. 874 17

Glenny v. Langdon, 98 U. S. 20 11

Gochenour v. Cleveland Terminals Bldg. Co. (C. C. A. 6, 1941), 118 F. 2d 89, 94-95 11

Gochenour v. George & Francis Ball Foundation, 35 F. Supp. 508, 517 11

Hann v. City of Clinton (C. C. A. 10, 1942), 131 F. 2d 978, 981 8
Hartmann v. Time (C. C. A. 3, 1948), 166 F. 2d 127, 134 18
Henderson v. Cabell, 43 Fed. 257 8
Industrial Research Corp. v. General Motors Corp. (D. Ct., Ohio, 1928), 29 F. 2d 623 18
International Shoe Company v. State of Washington, 326 U. S. 310 19
Kelly v. Dolan, et al. (C. C. A. 3, 1916), 233 Fed. 635 11
Klein v. Peter (C. C. A. 8, 1922), 284 Fed. 797 ..... 8, 9
Lauricella, et al. v. Evening News Pub. Co., 15 F. Supp. 671 .....17, 19
Layne v. Tribune Co. (C. A. D. C., 1934), 71 F. 2d 223 19
Leadman v. Fidelity & Casualty Co. of New York, 92 F. Supp. 782 8
Lincoln Nat. Life Ins. Co. v. Scales (C. C. A. 5, 1933), 62 F. 2d 582, 585 .....14, 15
McClean v. Bradley, 282 Fed. 1011 8
Merrimon v. Martindale-Hubbell, Inc., 36 F. Supp. 182 .....17, 19
Meyer v. Fleming, 327 U. S. 161, 169 .....8, 11
Mills Novelty Company v. Monarch Tool & Mfg. Co. (C. C. A. 6, 1931), 49 F. 2d 28 16
Moorhead v. Curtis Pub. Co., 43 F. Supp. 67, 69 19
Mutual Mfg. Co. v. Alpaugh, 174 Ind. 381, 385 18
Neely v. Philadelphia Inquirer Co. (C. A. D. C., 1932), 62 F. 2d 873 19
Nichols v. Cowles Magazines, Inc., 103 F. Supp. 864 .. 19
Partin v. Michaels Art Bronze Co., Inc. (C. C. A. 3, 1953), 202 F. 2d 541 19
Perkins v. Benguet Consolidated Mining Company, 342 U. S. 437, 443-444 19
Porter v. Sabin, 149 U. S. 473 8

Reagan v. Midland Packing Co. (C. C. A. 8, 1925), 8 F. 2d 954, 956 11
Rohlfing v. Cat's Paw Rubber Co., 99 F. Supp. 886, 893 17
Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182 8
Schmidt v. Crowell-Collier Pub. Co., 349 Ill. App. 229, 234 13
Sessions v. Romadka, 145 U. S. 29 16
Shattuck v. North British & Mercantile Ins. Co. (C. C. A. 8, 1893), 58 Fed. 609 8
Swope v. Villard, et al. (C. C. N. Y., 1894), 61 Fed. 417 10
Trimble v. Woodhead, 102 U. S. 647, 650 11
United States v. Smith (D. Ct. Ind., 1909), 173 Fed. 227 18
Weinert v. Kinkel, 296 N. Y. 151 8
Whitaker v. Macfadden Publications, Inc. (U. S. D. C., 1939), 105 F. 2d 44 19
Winrod v. Time, Inc., 334 Ill. App. 59 18
Wright v. J. R. Watkins Co., 86 Ind. App. 695, 698 ... 18

Statutes.

11 U. S. C. A. 94 (a) (4) 14
11 U. S. C. A. 587 8
Sec. 25-316, Burns Annot. Indiana Statutes, Acts 1939, ch. 60 17

Rules.

Federal Rules of Civil Procedure 12 (b); 12 (d); 43 (e); 81 (c) 17
Local bankruptcy Rule 19, United States District Court, Northern District of Illinois 13